



NORTHWEST ENVIRONMENTAL DEFENSE CENTER
10015 SW Terwilliger Blvd, Portland, OR 97219
PHONE: 503.768.6673 WEB: nedc.org

Submitted Via FOIA Online:

<https://www.foiaonline.gov/foiaonline/action/public/request>

March 30, 2020

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

RE: Request for public records pursuant to the Freedom of Information Act

Dear FOIA Officers:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 551 *et seq.*, the Northwest Environmental Defense Center ("NEDC") respectfully requests records held by the United States Environmental Protection Agency ("EPA") that pertain to certain Information Requests sent by EPA's Region 10 under the authority of Clean Air Act § 208, 42 U.S.C. § 7542. That Section requires manufacturers of new motor vehicles, new motor vehicle engines, or motor vehicle parts and components to provide information reasonably required by EPA to determine whether those persons are acting in compliance with various Clean Air Act requirements.

In particular, and as further described below, NEDC seeks records related to recent Information Requests sent by EPA Region 10 to manufacturers or wholesale or retail sellers of aftermarket automotive parts. NEDC requests these records in electronic format.

A. Documents Requested from EPA:

1. Information Requests sent June 28, 2017 and April 25, 2018, under the authority of Clean Air Act § 208, 42 U.S.C. § 7542, to Power Products Unlimited (d.b.a. Diesel Power Products), and all subsequent responses, communications,

documents, and other records related to those requests.

2. Notice of Violation issued to Power Products Unlimited (d.b.a. Diesel Power Products), dated October 23, 2018.
3. Information Request sent May 18, 2018, under the authority of Clean Air Act § 208, 42 U.S.C. § 7542, to Alligator Diesel Performance, LLC, and all subsequent responses, communications, documents, and other records related to that request.
4. Notice of Violation issued to Alligator Diesel Performance, LLC, dated January 28, 2019.
5. Information Request sent May 18, 2018, under the authority of Clean Air Act § 208, 42 U.S.C. § 7542, to Diesel Race Parts (d.b.a. Deviant Race Parts), and all subsequent responses, communications, documents, and other records related to those requests.
6. Notice of Violation issued to Diesel Race Parts dated January 28, 2019.
7. Any other Information Requests issued by EPA Region 10 under the authority of 42 U.S.C. § 7542, to manufacturers or wholesale or retail sellers of aftermarket automotive parts, dated January 1, 2018 – present, and all subsequent responses, communications, documents, and other records related to each of those requests.

This request encompasses all records, no matter the form, and includes, but is not limited to: documents, files (and their contents), photographs, reports, memoranda, applications, letters, notices, notes (electronic, handwritten, or otherwise), meeting minutes, graphs, charts, maps, spreadsheets, correspondence, email messages, data and electronic files. It also encompasses any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, may include any information not contained in the original record.

B. Request for Fee Waiver

NEDC requests that EPA waive all fees in connection with this request. NEDC is a 501(c)(3) non-profit corporation registered in the state of Oregon and was founded in 1969. NEDC is dedicated to the protection and restoration of the environment and

natural resources of the Pacific Northwest. Our members live, work, visit, and engage in recreational activities throughout the northwestern United States. NEDC works to educate its members and the general public about activities affecting the region's environment, natural resources, and public health, including air quality management activities that may affect public health. NEDC's work involves ensuring that state and federal regulatory agencies meet their legal obligations when regulating activities and projects that may have detrimental environmental impacts.

FOIA carries a presumption of disclosure and the fee waiver was designed specifically to allow nonprofit, public interest groups like NEDC access to government documents without the payment of fees. The federal courts have stated that the statute "is to be liberally construed *in favor of waivers* for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy))(emphasis added).

As shown below, NEDC satisfies FOIA's two-pronged test for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii); *see* 40 C.F.R. § 2.107(l). Under FOIA and the EPA's implementing regulations, the fee associated with the document production is waived if the release of the information is in the "public interest." 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge . . . [when it is determined that] disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of [EPA] and is not primarily in the commercial interest of the requester."); 40 C.F.R. § 2.107(l). Here, disclosure of the requested records is: (1) in the public interest, and (2) is not in the commercial interest of NEDC.

1. Disclosure of the information sought by this FOIA request is in the public interest because furnishing the information will contribute significantly to public understanding of the operations or activities of the EPA.

NEDC satisfies the first criterion for the fee waiver because the requested information will contribute significantly to the public understanding of the operations or activities of the EPA. NEDC, which is generally recognized as an established expert in the field of environmental protection and regulatory compliance, possesses the ability to disseminate the requested information to the general public.

- a. The subject matter of the request concerns the operations and activities of the EPA (40 C.F.R. § 2.107(l)(2)(i)).

The information requested concerns the operations and activities of the EPA. Any records relating to the relevant Information Requests sent by EPA Region 10 will provide insight into the manner in which the EPA is carrying out its oversight and enforcement duties under the Clean Air Act.

- b. The information to be disclosed has important informative value because it is meaningful and will inform the public of the operations or activities of the EPA (40 C.F.R. § 2.107(l)(2)(ii)).

Disclosure of this information will meaningfully contribute to the public understanding of EPA's operations and activities as they relate to the implementation of the Clean Air Act. NEDC has long-standing interests in the protection of air resources in the Pacific Northwest, including participating in legal actions seeking to enforce the Clean Air Act and participating in air quality permitting decisions. As a result, NEDC has developed significant expertise on those issues, and has also developed an extensive network of members, associates, and professional colleagues across the Pacific Northwest who are interested and actively engaged in protecting the region's air quality, including protecting against harm caused by improper motor vehicle engines, parts, and components.

Via a press release, EPA Region 10 has publicly highlighted recent settlements with three Pacific Northwest companies related to the manufacture and sale of aftermarket automotive parts.¹ These actions have garnered significant public attention. *See, e.g.,* The Spokesman-Review, Three Inland Northwest Diesel Truck Companies Agree to Pay EPA Penalties For Selling Prohibited Emission Products (March 5, 2020).² Generally, EPA has identified a National Compliance Initiative to stop the manufacture, sale, and installation of "defeat devices" on both onroad and non-road motor vehicles.³

¹ <https://www.epa.gov/newsreleases/epa-settles-diesel-emissions-cases-against-three-northwest-companies>

² <https://www.spokesman.com/stories/2020/mar/05/three-inland-northwest-diesel-truck-companies-agre/>

³ <https://www.epa.gov/enforcement/national-compliance-initiative-stopping-aftermarket-defeat-devices-vehicles-and-engines>

In light of all this, there is already an audience (including but not limited to NEDC members) eager for more information on EPA's efforts to protect the public from threats to air resources from the manufacture and sale of aftermarket motor vehicle products. Furthermore, the requested information subject to this FOIA request is not already available to the public. Therefore, using the various resources for analyzing and disseminating the information discussed below, NEDC will again act as a conduit providing access to this information sought by the general public.

- c. The disclosure of this information will contribute to the general public's understanding of the operations and activities of the EPA (40 C.F.R. § 2.107(l)(2)(iii)).

NEDC will use this information to contribute to the public understanding of how the EPA meets its Clean Air Act oversight obligations. Information that could "support oversight of [an agency's] operations" is precisely the type of information that Congress considered to have a "high potential for contribution to public understanding." *McClellan Ecological*, 835 F.2d at 1286. NEDC, long known for its leadership role and expertise in natural resource issues, uses a combination of education, research, advocacy, and litigation to advance its mission of informing the public on how the government is undertaking to protect natural resources and the environment.

NEDC intends to use the requested records to examine how the EPA is meeting its obligations to protect air quality and public health in the Pacific Northwest. After reviewing the information provided, NEDC intends to use its resources and expertise to inform and educate the public regarding the effect of the EPA's Clean Air Act oversight and enforcement activities on the region's natural resources and public health. This information may be disseminated to our members and supporters through, variously, our website, Facebook page, electronic media updates, printed newsletter, public comments, and other advocacy work, all of which are available free of charge to interested parties. NEDC will also make the requested information available free of charge to any member of the public that requests it from NEDC.

- d. The disclosure will significantly enhance the public's understanding of EPA's operations or activities (40 C.F.R. § 2.107(l)(2)(iv)).

The disclosure of this information is of wide public interest and will be unique in contributing previously unknown facts, thereby enhancing public knowledge of the

EPA's operations or activities. Public oversight and enhanced understanding of the EPA's implementation and enforcement of the Clean Air Act is absolutely necessary. NEDC's consistent contribution to the public's understanding of federal agency activities and their effect on the environment, as compared to the level of public understanding prior to disclosure, are well established.

In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is "whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Carney v U.S. Dept. of Justice*, 19 F.3d 807, 815 (2nd Cir. 1994). NEDC is comprised of professionals with scientific and legal expertise who regularly write, speak, and teach on natural resources protection, public health, and other issues and as demonstrated above, NEDC is uniquely qualified to disseminate the information to a large cross-section of the population.

2. Obtaining the information is of no commercial interest to NEDC

The second element of the fee waiver analysis concerns the requester's "commercial interest" in the information. EPA's FOIA regulations list two factors to consider in determining whether the information is "primarily in the commercial interest of the requester." The first factor is "the existence and magnitude of a commercial interest." (40 C.F.R. § 2.107(l)(3)(i)). As a 501(c)(3) nonprofit organization, NEDC has no commercial, trade or profit interest in the material requested. NEDC will neither be paid for nor receive other commercial benefits from its publication or dissemination of the material requested.

The regulations' second factor evaluates "the primary interest in the disclosure." (40 C.F.R. § 2.107(l)(3)(ii)). Clearly, there is great public interest in the release of the materials sought because they will allow for a more thorough analysis of how EPA implements the Clean Air Act and how it protects the public from significant threats to air quality. Thus, even assuming, *arguendo*, that NEDC had some "commercial" interest in the documents requested, a complete fee waiver would still be appropriate because NEDC's primary interest in the material is to inform the public about the operations and activities of the EPA. Therefore, the disclosure of the information is not "primarily in the commercial interest of" NEDC and a fee waiver is appropriate.

C. Request for Explanation of Exempted and Nonexistent Documents

Please include in your response an explanation and accounting of which documents, if any, may be privileged or exempt from this FOIA request and why. If you claim that the records should not be disclosed, please justify your determination by referring to the specific exemption that you are invoking under the FOIA. Also, please provide those portions of documents with information requested that are not specifically exempted from disclosure. If the documents do not exist, please indicate that in your written response.

D. Conclusion

As provided by FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the implementing regulations, please provide a written response to this request within ten business days of receipt. Thank you for your time and attention in this matter, and I look forward to hearing from you shortly. If you have any questions, feel free to contact me at (971) 219-4677.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonah Sandford', written in a cursive style.

Jonah Sandford
Staff Attorney